No. 98-1360

Supreme Court, U.S.
FILED
APR 1 1999
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES MONTIONE,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

EUGENE M. TALERICO, JR.
Assistant District Attorney
200 North Washington Avenue
Scranton, PA 18503
(570) 963-6717

MICHAEL J. BARRASSE*
District Attorney
Lackawanna County Courthouse
200 North Washington Avenue
Scranton, PA 18503
(570) 963-6717

ANDREW J. JARBOLA, III
First Assistant District Attorney
200 North Washington Avenue
Scranton, PA 18503
(570) 963-6717

Attorneys for Respondent

* *Counsel of Record*

152192

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
Reasons for Denying the Writ	4
I. The Decision Of The Pennsylvania Supreme Court Is In Accord With A Majority Of United States Courts Of Appeal Who Have Decided The Issue In Question And The Decision Of The Pennsylvania Supreme Court Does Not Further Aggravate The Existing Split Of Authority. .	4
II. The Decision Of The Pennsylvania Supreme Court Is Not Erroneous.	6
III. The Question Does Not Present An Issue Of Such Importance Or Significance To Require The Grant Of The Writ.	11
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Birdwell v. Skeen, 983 F.2d 1332 (5th Cir. 1993) ... 5, 8, 10

Commonwealth v. Baker, 627 N.E.2d 469 (Mass. App. Ct. 1994) 7

Commonwealth v. Thompson, 495 A.2d 560 (Pa. Super. 1985) 7

Cuyler v. Adams, 449 U.S. 433 (1981) 4

Jones v. State, 813 P.2d 629 (Wyo. 1991) 7

Knox v. State, 848 P.2d 1354 (Wyo. 1993) 7

People v. Leonard, 310 N.E.2d 15 (Ill. App. 1974) . 7

People v. Torres, 468 N.Y.S.2d 606 (N.Y. 1983) ... 7

Stroble v. Anderson, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979) 5, 6, 11

United States v. Cephas, 937 F.2d 816 (2d Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992) 4, 6

United States v. Collins, 90 F.3d 1420 (9th Cir. 1996) 5, 8, 9

United States v. Dawn, 900 F.2d 1132 (7th Cir.), *cert. denied*, 498 U.S. 949 (1990) 5, 6

Cited Authorities

Page

United States v. Hines, 717 F.2d 1481 (4th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984) 4, 5, 6, 7

United States v. Johnson, 953 F.2d 1167 (9th Cir.), *cert. denied*, 506 U.S. 879 (1992) 5, 7

United States v. Neal, 36 F.3d 1190 (1st Cir. 1994) . 4, 7

United States v. Nesbitt, 852 F.2d 1502 (7th Cir. 1988), *cert. denied*, 488 U.S. 1015 (1989) 5, 6, 7

United States v. Scheer, 729 F.2d 164 (2d Cir. 1984) 4, 7

United States v. Walker, 924 F.2d 1 (1st Cir. 1991) . 4

United States v. Whiting, 28 F.3d 1296 (1st Cir. 1994) 4

Statute:

42 Pa. C.S. § 9101, *et seq.* 1

Rule:

Pa. R. Crim. P. 1100 7

Cited Authorities

Page

Other Authorities:

Interstate Agreement on Detainers:

Article IV 6

Article IV(c) 1, 3, 6

Article VI 6

Article VI(a) 4, 6, 7, 8, 10, 11, 12

Article VI(b) 10

Article VI(c) 7

STATEMENT OF THE CASE

On October 8, 1993, a criminal complaint was filed charging the petitioner with, *inter alia*, First Degree Murder as an Accomplice for his participation in the brutal "contract killing" of Edward "Ned" Tracy in February, 1986. On December 23, 1994, the Commonwealth of Pennsylvania, through the Lackawanna County District Attorney's Office, filed a *Form V Request for Temporary Custody* of petitioner pursuant to the Interstate Agreement on Detainers (IAD), 42 Pa. C.S. § 9101, *et seq*. At the time, the petitioner was a sentenced federal prisoner housed at the United States Penitentiary at Lewisburg, PA. Upon receipt of the aforementioned *Form V* request, the petitioner exercised his rights under the IAD and indicated his intention to contest his return to Lackawanna County by requesting thirty (30) days within which to do so.

Ultimately, on February 4, 1994, the petitioner was transferred from the custody of federal officials and placed into the custody of the Commonwealth of Pennsylvania pursuant to its *Form V* request under Article IV(c) of the IAD. On February 4, 1994, petitioner's preliminary hearing on the murder charges was held and all counts were held for further court action.

On February 17, 1994, the Commonwealth filed a motion to consolidate petitioner's case with that of Charles Oliver who had been charged as a principal in the murder of Mr. Tracy. A hearing on the motion to consolidate, along with a court-scheduled pre-trial conference, was set for March 24, 1994, before Judge S. John Cottone. However, said hearing

was continued until April 28, 1994, by counsel for Mr. Oliver, without objection from either the district attorney or counsel for petitioner, Mr. Montione.[1]

On March 17, 1994, petitioner filed an Omnibus Pretrial Motion which included a Motion to Quash the Information, a Motion to Suppress Statements and a Motion to Appoint a Private Investigator. The Commonwealth filed an answer to petitioner's Omnibus Pretrial Motion on March 21, 1994. At no time during the pretrial motion proceedings did the Petitioner advise the trial court of the applicability of the IAD nor did he address the IAD in any pleadings prior to September 1, 1994. On July 27, Judge Cottone, after hearing arguments from both the petitioner and the Commonwealth, entered an order finding that the appellant was "unable to stand trial" pursuant to the IAD since petitioner's Omnibus Pretrial Motion remained unresolved. Moreover, on September 22, 1994, Judge Cottone entered a similar order finding the petitioner "unable to stand trial" since petitioner's motion was still unresolved.

On September 1, 1994, petitioner filed a Motion to Dismiss pursuant to the IAD, alleging that the Commonwealth had failed to bring him to trial within the 120-day time frame mandated by Article IV(c) of the IAD.[2] On October 14, 1994,

---

1. An order was entered on March 24, 1994, by Judge S. John Cottone granting Mr. Oliver's request for a continuance and noting that petitioner had *no objection to the grant of said continuance.*

2. In July 1994, petitioner, unbeknownst to the Commonwealth, wrote two letters to Judge Cottone advising the court of his readiness for trial and the latter correspondence spoke of the applicability of the IAD. However, there is no evidence nor is there a suggestion by the petitioner that the court read the contents of the correspondence (Cont'd)

Judge Cottone granted the Commonwealth's motion to consolidate, denied petitioner's Omnibus Pretrial Motion and scheduled trial for November 17, 1994. After hearing arguments on that motion, both the petitioner's case and that of Mr. Charles Oliver, were re-assigned to Judge James M. Munley since Judge Cottone was scheduled to begin a protracted capital murder trial in the Fall of 1994. Subsequently, the November 17, 1994, trial date was re-scheduled. On December 20, 1994, after hearing argument and receiving briefs on the matter, Judge Munley issued an Opinion and Order denying petitioner's motion to dismiss.

Petitioner then waived his right to a jury trial and a bench trial commenced on January 6, 1995. As a result of petitioner's waiver, his case was separated from that of his co-defendant, Charles Oliver. Ultimately, petitioner was convicted of First Degree Murder and Criminal Conspiracy and was sentenced to a term of life plus five (5) to ten (10) years in a state correctional facility. Petitioner was then returned to federal custody were he remains at present.

(Cont'd)
since they would have constituted *ex parte* communication. Since the correspondence was not forwarded to the Commonwealth nor was it authored by counsel for petitioner, it is of dubious significance for the question before the court.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS IN ACCORD WITH A MAJORITY OF UNITED STATES COURTS OF APPEAL WHO HAVE DECIDED THE ISSUE IN QUESTION AND THE DECISION OF THE PENNSYLVANIA SUPREME COURT DOES NOT FURTHER AGGRAVATE THE EXISTING SPLIT OF AUTHORITY.

It is true that the Pennsylvania Supreme Court recognized that an off-balanced split of authority exists among the various circuits within the United States Courts of Appeal regarding the interpretation of the phrase "unable to stand trial" in Article VI(a) of the IAD.[3] Specifically, six (6) United States Circuit Courts have held that the IAD's "speedy trial" provision, Article VI(a), may be tolled by the prisoner's filing of pretrial motions.[4] However, both the Fifth and Sixth

---

3. The respondent does not contest petitioner's assertion that interpretation of the IAD presents a federal question thereby allowing review of a state court decision by a federal court. *See Cuyler v. Adams*, 449 U.S. 433 (1981). As such, the jurisdiction of this court is not questioned. However, the respondent suggests that though review by United States Supreme Court is permissible, it is unnecessary in light of the well-reasoned, legally accurate decision handed down by the Pennsylvania Supreme Court.

4. *United States v. Neal*, 36 F.3d 1190 (1st Cir. 1994); *United States v. Whiting*, 28 F.3d 1296 (1st Cir. 1994); *United States v. Walker*, 924 F.2d 1 (1st Cir. 1991); *United States v. Scheer*, 729 F.2d 164 (2d Cir. 1984); *United States v. Cephas*, 937 F.2d 816 (2d Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992); *United States v. Hines*, (Cont'd)

Circuits have reached opposite conclusions on the same question. *See Stroble v. Anderson*, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979); *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993).

Though decisions rendered by both the Fifth and Sixth Circuits differ with those of six (6) other federal circuits, the Respondent suggests that the presence of a small dissenting minority among federal circuits does not automatically trigger the need for review by the United States Supreme Court. In fact, a review of the decisions of the First, Second, Fourth, Seventh, Eighth and Ninth Circuits reveals a more well-reasoned interpretation of the IAD's tolling provisions since it is desirable "[t]o maintain consistency when resolving issues similar to [ ] speedy trial provisions, and that such congruity benefits the trial courts and practicing attorneys." *Commonwealth v. Montione*, 720 A.2d 738, 744 (Pa. 1998) (Nigro, J., *concurring*). Moreover, such congruity also inures to the benefit of a detainee by demonstrating a clear and consistent interpretation of speedy trial provisions.

It is also well to note that the Sixth Circuit's decision in *Stroble v. Anderson*, *infra*, was handed down in 1978. Since that time seven (7) different federal circuits passed upon the same issue as the *Stroble* court with all but one finding, implicitly or explicitly, that *Stroble* employed faulty logic or analysis thereby resulting in opposite conclusions. Moreover,

---

(Cont'd)

717 F.2d 1481 (4th Cir. 1983); *United States v. Dawn*, 900 F.2d 1132 (7th Cir.), *cert. denied*, 498 U.S. 949 (1990); *United States v. Nesbitt*, 852 F.2d 1502 (7th Cir. 1988); *United States v. Collins*, 90 F.3d 1420 (9th Cir. 1996); *United States v. Johnson*, 953 F.2d 1167 (9th Cir.), *cert. denied*, 506 U.S. 879 (1992).

the decisions in *Cephas*, *Dawn*, *Hines* and *Nesbitt* occurred ***after*** the Sixth Circuit's ruling in *Stroble* and in each case, despite the split of authority, this Court consistently denied petitions for review. Since the petitioner has demonstrated no reason, other than those present in the aforementioned cases, the respondent respectfully suggests that certiorari be denied.

II.

THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS NOT ERRONEOUS.

As stated above, since the respondent, the Commonwealth of Pennsylvania, sought the return of the petitioner to its jurisdiction under the IAD, the "speedy trial" provisions of Article IV and Article VI became applicable. Article IV(c) states, in relevant part:

> [I]n respect to any proceeding made possible by this article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter my grant any necessary or reasonable continuance.

In computing the time restrictions of Article IV(c), Article VI(a) of the IAD mandates:

> [I]n determining the duration and expiration dates of the time periods provided in Article III and Article IV of this Agreement, the running of said time periods ***shall be tolled*** whenever and for as

> long as the prisoner is ***unable to stand trial***, as determined by the court having jurisdiction of the matter.

(Emphasis supplied).

The decision of the Pennsylvania Supreme Court finding that the IAD time clock is tolled by the filing of pretrial motions by a defendant is in accord with numerous decisions both from other state courts as well as federal circuit courts of appeal.[5] Moreover, it is likewise clear that the Pennsylvania Supreme Court's decision is not at odds with the plain meaning and legislative history of the IAD. The IAD nowhere addresses the impact of a prisoner's filing of pretrial motions on the timing provisions of Article VI(c) nor does it specifically define the meaning of "unable to stand trial" as used in Article VI(a). As such, it is sensible for courts to interpret the IAD's timing provisions in a manner consistent with other "speedy trial" provisions so as to promote congruity and fairness among litigants and the courts.

---

5. *See Commonwealth v. Thompson*, 495 A.2d 560 (Pa. Super. 1985) (where defendant subject to IAD time limits filed motion to dismiss under Pa. R. Crim. P. 1100 (speedy trial rule) time was tolled because defendant caused delay); *People v. Leonard*, 310 N.E.2d 15 (Ill. App. 1974); *Commonwealth v. Baker*, 627 N.E.2d 469 (Mass. App. Ct. 1994); *People v. Torres*, 468 N.Y.S.2d 606 (N.Y. 1983); *Knox v. State*, 848 P.2d 1354 (Wyo. 1993); *Jones v. State*, 813 P.2d 629 (Wyo. 1991); *United States v. Neal*, 36 F.3d 1190 (1st Cir. 1994); *United States v. Scheer*, 729 F.2d 164 (2d Cir. 1984); *United States v. Hines*, 717 F.2d 1481 (4th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984); *United States v. Nesbitt*, 852 F.2d 1502 (7th Cir. 1988), *cert. denied*, 488 U.S. 1015 (1989); *United States v. Johnson*, 953 F.2d 1167 (9th Cir.), *cert. denied*, 506 U.S. 879 (1992).

Therefore, since the IAD does not speak to the meaning of the phrase "unable to stand trial", circuit courts of appeal have chosen an interpretation consistent with the federal speedy trial act. Most notably, the Ninth Circuit recently addressed the different standards circuit courts have used to determine whether a prisoner is "unable to stand trial" under Article VI(a) of the IAD. In *United States v. Collins*, 90 F.3d 1420 (9th Cir. 1996), the court examined the Fifth Circuit's decision in *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993), and disagreed with the *Birdwell* court's standard for interpreting the meaning of "unable to stand trial".

Specifically, *Collins* found that the standard adopted by the Fifth Circuit was too narrow. *Collins*, 90 F.3d at 1427. In addressing whether "unable to stand trial" should be defined to include only physical or mental incapacity, the court made the following observation:

> [O]ur concern with the Fifth Circuit's analysis is that the IADA specifically addresses mental incapacity — half of the Fifth Circuit's definition of "unable to stand trial". Under the terms of the IADA, the IADA does not apply to persons who are mentally ill. [ ] [IADA] Art. VI(b) ("No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill"). Had the drafters of the IADA wanted to exclude only the physically incapacitated, in addition to the mentally ill, they would have done so explicitly.

Collins, 90 F.3d at 1427.

Moreover, the court declined to adopt the standard utilized by the Seventh and Eighth Circuits known as the "legally or administratively" unavailable standard as it is too broad and provides little guidance to the courts. *Id.* Ultimately, the court adopted the standard utilized by the Pennsylvania Supreme Court and the Second and Fourth Circuits; that is, interpreting the IAD's tolling provisions in a manner consistent with the federal or state speedy trial acts. In arriving at that decision, the court noted that both the federal speedy trial act and the IADA tolling provisions serve the same purposes. *Id.*

Similarly, the Pennsylvania Supreme Court noted:

> [A]lthough this court has not previously addressed tolling requirements in relation to the IAD, we find persuasive the analysis and interpretation of the courts that held the delay occasioned by the defendant is excludable, particularly in light of recent application of speedy trial provisions to IAD cases by Pennsylvania courts. *See e.g.*, *Commonwealth v. Woods*, 663 A.2d 803 (Pa. Super. 1995) (applying speedy trial provisions to the IAD in holding that defendant's continued presence in federal custody constituted a presence in federal custody constitutes an inability to stand trial, thereby tolling the statute). *Cf.*, *Commonwealth v. Riffert*, 549 A.2d 566 (Pa. Super. 1988), *alloc. denied*, 562 A.2d 825 (Pa. 1989) (holding that the speedy trial provision [Pa. R. Crim. P. 1100] is tolled when a defendant's pretrial motion is pending). The *Woods* court determined that the IAD is consistent with the speedy trial provisions of Pa. R. Crim P. 1100. (citation omitted).

Commonwealth v. Montione, 720 A.2d 738, 741 (Pa. 1998). The respondents suggest that the standard applied by the Pennsylvania Supreme Court was not erroneous and fosters the goal of maintaining consistency of interpretation among speedy trial provisions as well as advancing the proposition that a criminal defendant shall not benefit by delay created by him.[6]

Furthermore, the logic employed by both the petitioner and the Fifth Circuit in its *Birdwell* decision is fatally flawed. The *Birdwell* court concluded that since the phrase "unable to stand trial", in its review of pre-IAD law, referred only to mental and physical ability, the phrase in the IAD's tolling provision should be given the same meaning. *Birdwell*, 983 F.2d at 1340-41. However, that conclusion ignores the provision of the IAD which prohibits its applicability to those who are adjudged mentally ill. IAD, Art. VI(b). Clearly, the framers of the IAD had considered the applicability of the Agreement to mentally ill persons and decided that the act, in its entirely, would not be applicable to such persons. If, as petitioner contends, the phrase "unable to stand trial" in Article VI(a) also refers to mental disability, its existence would be mere surplusage — repetitive of Article VI(b)'s mandate. As a result, sound logic and time-honored principles

---

6. Justice Nigro, in his concurring opinion, strongly disagreed with the assertion that a finding that the filing of pretrial motions tolls the IAD's time provisions would punish a criminal defendant for exercising his constitutional rights. Justice Nigro correctly observed that since the defendant sought to benefit from filing pretrial motions and such filings create delays to hold otherwise would "[p]lace the keys to the jailhouse door" in a criminal defendant's hands by allowing him to file pretrial motions and at the same time allow the IAD clock to run. *Commonwealth v. Montione*, 720 A.2d 738, 744 (Pa. 1998) (J, Nigro, *concurring*).

of statutory construction dictate that the insertion of the phrase "unable to stand trial" in Article VI(a) was designed to deal with *any* circumstance where a prisoner becomes unable to stand trial, from the filing of pretrial motions to physical ability to be tried.

In sum, the Pennsylvania Supreme Court's interpretation of the phrase "unable to stand trial" as used in Article VI(a) of the IAD, is in accord not only with decisions of other state jurisdictions but also with six (6) separate federal circuits which have passed upon the issue. Moreover, the interpretation is strongly supported by the very provisions of the IAD as well as the public policy desire to maintain consistent interpretation of similar statutes and, as a result, the Pennsylvania Supreme Court's decision was not erroneous.

III.

THE QUESTION DOES NOT PRESENT AN ISSUE OF SUCH IMPORTANCE OR SIGNIFICANCE TO REQUIRE THE GRANT OF THE WRIT.

Though an off-balanced conflict of authority exists within the United States Circuit Courts of Appeal as well as state appellate courts, the importance of the question presented is overstated by the petitioner. As mentioned earlier, seven (7) circuits have interpreted the meaning of the phrase "unable to stand trial" since the *Stroble* decision by the Sixth circuit in 1978. Six of seven circuits reviewing the phrase has expressly refused to adopt the rationale of *Stroble* and each of the (6) circuits has indicated their preference to define "unable to stand trial" as encompassing periods of delay occasioned by a prisoner's filing of pretrial motions.

Therefore, the consistent interpretation of Article VI(a)'s tolling provision strongly mitigates the importance of the question presented and, as such, the petition for certiorari should be denied.

CONCLUSION

WHEREORE, based upon the forgoing, the Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

MICHAEL J. BARRASSE*
District Attorney
Lackawanna County Courthouse
200 North Washington Avenue
Scranton, PA 18503
(570) 963-6717

EUGENE M. TALERICO, JR.
Assistant District Attorney
200 North Washington Avenue
Scranton, PA 18503
(570) 963-6717

ANDREW J. JARBOLA, III
First Assistant District Attorney
200 North Washington Avenue
Scranton, PA 18503
(570) 963-6717

Attorneys for Respondent

* *Counsel of Record*